Supreme Court, U. S.
FILED
MAR 2 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-539

DAYTON BOARD OF EDUCATION,
WILLIAM E. GOODWIN,
JOSEPHINE GROFF and
JAMES D. HART,

Petitioners,

v.

MARK BRINKMAN,
PATTY BRINKMAN, and
PHILLIP BRINKMAN,
By Their Mother and Next Friend, Donna
Brinkman, et al.,

Respondents.

(Additional Respondents Inside Cover)

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF PETITIONERS

DAVID C. GREER
LEO F. KREBS
BIESER, GREER & LANDIS of counsel
8 North Main Street
Dayton, Ohio 45402

Counsel for Petitioners

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

Additional Respondents:

Jesse Montague, Jr. and Debbora Montague,
by their Mother and Next Friend, Arva Montague;

Debbora Mitchell,
by her Father and Next Friend, John Mitchell;

Robbin J. Kent, Michael J. Kent and Leslie A. Kent,
by their Father and Next Friend Henry K. Kent;

Claudius R. Walker, Frserieea M. Walker and Bernice L. Walker, by their Father and Next Friend, C. R. Walker, Jr.;

Rubin Atitia Jackson and Lahmarie Jackson,
by their Mother and Next Friend, Winona Jackson;

National Association for the Advancement of Colored People;

John J. Gilligan, Governor of the State of Ohio, etc.;

William J. Brown,
Attorney General of the State of Ohio;

Ohio State Board of Education;

Martin W. Essex, Superintendent of Public Instruction,
Ohio Department of Education;

Terry Lawson;

Leo A. Lucas;

Jane Sterzer;

Wayne M. Carle,
Superintendent of Dayton School District.

TABLE OF CONTENTS

	Page
I. OPINIONS BELOW	1
II. JURISDICTION	2
III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
IV. QUESTIONS PRESENTED	
A. Does The Imposition Of A District-Wide Racial Balance Remedy Exceed The Remedial And Equitable Powers Of A Federal Court And Does Such Imposition Violate 28 U.S.C. § 1712, Where, Although Isolated Segregative Practices Have Been Found To Exist, It Has Been Affirmatively Determined That The Board Of Education Has At No Time Maintained A Dual System?	5
B. Is A Judicial Decree Valid Which Requires A Fixed Racial Balance For Each And Every School In The System?	5
C. Is A Desegregation Remedy That Will Result In Resegregation Constitutionally Mandated?	5
D. Is A Judicial Decree Valid Where The Complainants Have Failed To Establish That Any Injury To Them Has Occurred Or That The Action Is Maintainable As A Class Action?	5
V. STATEMENT OF THE CASE	6
VI. SUMMARY OR ARGUMENT	13

Page

VII. ARGUMENT 14

A. IN A SCHOOL DESEGREGATION CASE THE IMPOSITION OF A DISTRICT-WIDE RACIAL BALANCE REMEDY EXCEEDS THE REMEDIAL AND EQUITABLE POWERS OF A FEDERAL COURT AND VIOLATES 28 U.S.C. § 1712 WHERE, ALTHOUGH ISOLATED SEGREGATIVE PRACTICES HAVE BEEN FOUND TO EXIST, IT HAS BEEN AFFIRMATIVELY DETERMINED THAT THE BOARD OF EDUCATION HAS AT NO TIME MAINTAINED A DUAL SYSTEM 14

1. The Limited Nature Of The Violation In This Case Was Carefully And Narrowly Defined By The Finder Of The Facts. 16

a. The adverse finding of racially imbalanced schools has no independent constitutional significance. 19

b. The adverse finding with respect to rescission of the resolution of December 8, 1971 has no independent constitutional significance. 20

c. The adverse finding with respect to optional zones, whether considered separately or as part of a cumulative violation, did not involve a substantial portion of the students in the Dayton system. 22

2. The Sweeping Remedy Imposed In This Case Should Be Restructured In Relationship To The Nature Of The Violation. .. 25

Page

3. The Remedy Imposed In This Case Erroneously Elevates The Achievement Of Racial Balance To The Status Of A Constitutional Right. 27

4. The Remedy Imposed In This Case Violates The Equal Educational Opportunities Act of 1974. 30

B. IN A SCHOOL DESEGREGATION CASE THE IMPOSITION OF A DECREE WHICH REQUIRES A FIXED RACIAL BALANCE FOR EACH AND EVERY SCHOOL IN THE SYSTEM IS INVALID. .. 32

C. THE CONSTITUTION CANNOT BE DEEMED TO MANDATE A DESEGREGATION REMEDY THAT WILL RESULT IN RESEGREGATION OF STUDENTS SERVED BY THE SCHOOL SYSTEM. 35

D. A COURT IS WITHOUT POWER TO IMPOSE A DECREE IN A SCHOOL DESEGREGATION CASE WHERE THE COMPLAINANTS HAVE FAILED TO ESTABLISH THAT ANY INJURY TO THEM HAS OCCURRED OR THAT THE ACTION IS MAINTAINABLE AS A CLASS ACTION. 37

1. The Record Is Void Of Any Evidence That Any Of The Adverse Respondents Sustained Any Injury Or Was Deprived Of Any Constitutional Right. 38

Page

2. The Record Is Void Of Any Evidence That Any Of The Respondents Was A Member Of The Class They Purportedly Represented And There Was No Determination That This Action Was Maintainable As A Class Action. 39

VIII. CONCLUSION 41

CITATIONS

Cases:

Austin Independent School District v. *United States*, – U.S. –, 45 U.S.L.W. 3413 (U.S. Dec. 6, 1976) (per curiam) 26, 41

Bailey v. *Patterson*, 369 U.S. 31 (1962) 40

Bell v. *Hood*, 327 U.S. 678 (1946) 39

Bradley v. *Milliken*, 411 F.Supp. 943 (E.D. Mich. 1975), *modified*, 540 F.2d 229 (6th Cir. 1976) 32

Bradley v. *School Board of City of Richmond*, 462 F.2d 1058 (4th Cir. 1972), *aff'd equally divided court*, 412 U.S. 92 (1973) 19

Brinkman v. *Gilligan*, 503 F.2d 684 (6th Cir. 1974) 8, 16, 17, 21, 38

Brinkman v. *Gilligan*, 518 F.2d 853 (6th Cir.), *cert. denied*, 423 U.S. 1000 (1975) 11, 16, 20, 31

Brinkman v. *Gilligan*, 539 F.2d 1084 (6th Cir. 1976) 13, 16, 30, 34

Brotherhood of Locomotive Firemen and Engineermen v. *Bangor and Aroostook R.R.*, 389 U.S. 327 (1967) 11

Page

Brown v. *Board of Education*, 347 U.S. 483 (1954) ..19, 30

Brown v. *Board of Education*, 349 U.S. 294 (1955) 15

Calhoun v. *Cook*, 522 F.2d 717 (5th Cir. 1975) 36

Carr v. *Montgomery County Board of Education*, 377 F.Supp. 1123 (M.D. Ala. 1974), *aff'd*, 511 F.2d 1374 (5th Cir.), *cert. denied*, 423 U.S. 986 (1975) 35

Davis v. *Board of Commissioners of Mobile County*, 402 U.S. 33 (1971) 36

Davis v. *Schultz*, 453 F.2d 497 (3rd Cir. 1971) 40

Dayton Board of Education v. *Brinkman*, 423 U.S. 1000 (1975) 11-12

Deal v. *Cincinnati Board of Education*, 419 F.2d 1387 (6th Cir. 1969), *cert. denied*, 402 U.S. 962 (1971) 20

Gomillion v. *Lightfoot*, 364 U.S. 339 (1960) 21

Green v. *County School Board*, 391 U.S. 430 (1968) .. 36

Hamilton Shoe Co. v. *Wolf Brothers*, 240 U.S. 251 (1916) . 11

Hunter v. *Erickson*, 393 U.S. 385 (1969) 21

Kauffman v. *Dreyfus Fund, Inc.*, 434 F.2d 727 (3rd Cir. 1970), *cert. denied*, 401 U.S. 974 (1971) 40

Keyes v. *School District No. 1, Denver, Colorado*, 413 U.S. 189 (1973) 8, 9, 11, 15, 19, 20, 23, 29, 30

Lawlor v. *Board of Education of City of Chicago*, 458 F.2d 660 (7th Cir. 1972), *cert. denied*, 413 U.S. 921 (1973) 19

McCabe v. *A.T. & S.F. Railway Co.*, 235 U.S. 151 (1914) 38

Milliken v. *Bradley*, 418 U.S. 717 (1974) 15, 28

O'Shea v. *Littleton*, 414 U.S. 488 (1974) 38

Pasadena City Board of Education v. *Spangler*, – U.S. –, 49 L.Ed.2d 599 (1976) 34, 40

Page

San Antonio Independent School District v. *Rodriguez*, 411 U.S. 1 (1973) 21

Spencer v. *Kugler*, 326 F. Supp. 1235 (D. N.J. 1971), *aff'd*, 404 U.S. 1027 (1972) 19

Swann v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) 9, 10, 11, 15, 29, 30, 31, 35, 36, 39

Village of Arlington Heights v. *Metropolitan Housing Development Corporation*, – U.S. –, 50 L.Ed.2d 450 (1977) 20, 38

Washington v. *Davis*, 426 U.S. 229, 48 L.Ed.2d 597 (1976) ► 20, 23

United States Constitution:

Fourteenth Amendment 2

Statutes:

20 U.S.C. § 1712 .....2, 31

20 U.S.C. § 1751 .....2, 31

20 U.S.C. § 1754 .....3, 31

28 U.S.C. § 1254 2

28 U.S.C. § 1343 .....3, 6, 39

28 U.S.C. § 1712 .....5, 14

42 U.S.C. § 1981 .....4, 6, 39

42 U.S.C. § 1983 .....4, 6, 39

33 Ohio Revised Code § 3313.48 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-539

DAYTON BOARD OF EDUCATION,
WILLIAM E. GOODWIN,
JOSEPHINE GROFF and
JAMES D. HART,

Petitioners,

v.

MARK BRINKMAN,
PATTY BRINKMAN, and
PHILLIP BRINKMAN,
By Their Mother and Next Friend, Donna Brinkman, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

---

BRIEF OF PETITIONERS

I. OPINIONS BELOW

The July 26, 1976 opinion of the Court of Appeals for the Sixth Circuit is reported at 539 F.2d 1084. The opinions of the Court of Appeals issued on June 24, 1975 and August 20, 1974 are reported at 518 F.2d 853 and 503 F.2d 684, respectively.

All these decisions and the unreported opinions of the District Court are reproduced in the appendix.

II. JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgments of the Court of Appeals for the Sixth Circuit were made and entered on July 26, 1976, June 24, 1975 and August 20, 1974.

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Fourteenth Amendment To The United States Constitution, Section 1:

". . . nor shall any such State . . . deny to any person within its jurisdiction the equal protection of the law."

B. United States Code, Title 20:

§ 1712. Formulating remedies; applicability:

In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court, department, or agency of the United States shall seek to impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws. 20 U.S.C. § 1712, p. 1685, Supp. V, 1975 (1970 ed.).

§ 1751. Prohibition against assignment or transportation of students to overcome racial imbalance:

No provision of this Act shall be construed to require the assignment or transportation of students or teachers in order to overcome racial imbalance. 20 U.S.C. § 1751, p. 1686, Supp. V, 1975 (1970 ed.).

§ 1754. Provisions respecting transportation of pupils to achieve racial balance and judicial power to insure compliance with constitutional standards applicable to the entire United States:

The proviso of section 2000c-6(a) of Title 42 providing in substance that no court or official of the United States shall be empowered to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards shall apply to all public school pupils and to every public school system, public school and public school board, as defined by section 2000c of Title 42, under all circumstances and conditions and at all times in every State, district, territory, Commonwealth or possession of the United States, regardless of whether the residence of such public school pupils or the principal offices of such public school system, public school or public school board is situated in the northern, eastern, western, or southern part of the United States. 20 U.S.C. § 1754, p. 1687, Supp. V, 1975 (1970 ed.).

C. United States Code, Title 28:

§ 1343. Civil rights and elective franchise:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails

to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. 28 U.S.C. § 1343, p. 7571 (1970 ed.).

D. United States Code, Title 42:

§ 1981. Equal rights under the law:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. 42 U.S.C. § 1981, p. 10281 (1970 ed.).

§ 1983. Civil action for deprivation of rights:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. § 1983, p. 10283 (1970 ed.).

E. Ohio Revised Code, Chapter 33:

§ 3313.48. Free education to be provided; minimum school year:

The Board of Education of each city, exempted village, local and joint vocational school district shall provide for the free education of the youth of school age within the district under its jurisdiction at such places as will be most convenient for the attendance of the largest number thereof. 33 O.R.C. § 3313.48, p. 175 (1972).

IV. QUESTIONS PRESENTED

A. Does The Imposition Of A District-Wide Racial Balance Remedy Exceed The Remedial And Equitable Powers Of A Federal Court And Does Such Imposition Violate 28 U.S.C. § 1712, Where, Although Isolated Segregative Practices Have Been Found To Exist, It Has Been Affirmatively Determined That The Board Of Education Has At No Time Maintained A Dual System?

B. Is A Judicial Decree Valid Which Requires A Fixed Racial Balance For Each And Every School In The System?

C. Is A Desegregation Remedy That Will Result In Resegregation Constitutionally Mandated?

D. Is A Judicial Decree Valid Where The Complainants Have Failed To Establish That Any Injury To Them Has Occurred Or That The Action is Maintainable As A Class Action?

V. STATEMENT OF THE CASE

The complaint commencing this school desegregation action was filed in the United States District Court for the Southern District of Ohio, Eastern Division, on April 17, 1972 by individuals purporting to act on their own behalf as parents and on behalf of their minor children who attended schools in the Dayton Public School District and by the National Association for the Advancement of Colored People (all of whom are hereinafter referred to as adverse respondents). Named as defendants to the complaint were the Governor of Ohio, the Attorney General of Ohio, the State Board of Education, the Superintendent of the Ohio Department of Education, six individual members of the Dayton Board of Education and the Superintendent of the Dayton School District.

A trial on the single issue of whether the school system of Dayton was a segregated one by reason of acts of the Dayton Board of Education commenced on November 13, 1972. Equity jurisdiction of the District Court was predicated upon the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and upon 28 U.S.C. § 1343 and 42 U.S.C. §§ 1981 and 1983 (A. 1).

None of the adverse respondents testified at the trial and none of the evidentiary exhibits established that any of the named adverse respondents was ever excluded from attending any school in the Dayton system or that any was a member of a class that was allegedly excluded. Likewise, there was no evidence that any of the adverse respondents was a school child or a parent of a school child or that any of them ever attended or sought to attend a school within the Dayton district.

On February 7, 1973 the Trial Court rendered an opinion in which it found that racially imbalanced schools, optional attendance zones and recent Board action in rescinding three resolutions calling for racial and economic balance in each school in the Dayton system constituted a cumulative violation of the Equal Protection Clause, and that the rescission action

constituted an independent constitutional violation (A. 11, 12). While school practices in the area of staff assignment, establishment of attendance zones, school construction and site selection, grade structure and organization, student transfers and transportation were alleged to have constituted the establishment of a dual system, these practices were passed upon by the District Judge and were found free from any segregative intent or effect (A. 5-10).

In order to correct the constitutional violations, the District Court ordered the Dayton Board to submit a plan which would (1) abolish all optional zones, (2) restate the priorities of the Freedom of Enrollment Program so that racial transfers would take precedence over curriculum transfers, (3) maintain the faculty assignment practices so that the faculty in each school would continue to reflect the approximate racial balance of the total black-to-white faculty in the Dayton system, and (4) establish hiring practices which would enable the clerical and maintenance personnel hired by the Dayton system to approximate the proportion of the black-to-white population within the Dayton system (A. 13).

In compliance with the February 7, 1973 order of the District Court, the Dayton Board submitted its plan to the Court. This plan contained eleven points:

(1) Elimination of all elementary and high school optional areas (A. 131);

(2) Revision of the Freedom of Enrollment Program whereby racial balance took priority over other permissible transfers (A. 133);

(3) Declaration that faculty assignment to each school would continue to reflect a racial composition that would approximate a ratio of black-to-white faculty in the entire district (A. 135);

(4) Modification of hiring practices for classified personnel (A. 136);

(5) Establishment of four city-wide elementary science centers the enrollment of which would approximate the existing black-white ratio of students in the system (A. 137);

(6) Combination of two high schools into a unified co-operative school with district-wide attendance areas (A. 139);

(7) Formation of elementary and high school all-city bands, orchestras and choruses (A. 140);

(8) Provisions for scheduling of integrated athletics (A. 140);

(9) Establishment of a minority language program for education of staff (A. 141);

(10) Utilization of the Living Arts Center for inter-racial experiences in art, creative writing, dance and drama (A. 141);

(11) Creation of centers for rumor control, school guidance and area learning (A. 142).

After submission of the Board plan and after publication of *Keys* v. *School District No. 1, Denver, Colorado,* 413 U.S. 189 (1973), the District Judge entered a supplemental order on remedy (A. 26-31). In this July 13, 1973 opinion the Trial Court stated that there was no "evidence of a failure of the equality of facilities, instructors and curricula opportunities . . . ." (A. 30). The Trial Court adopted the Board plan with the modification that any student could attend any high school of his or her choice within the Dayton system.

An appeal from the constitutional violations and remedy judgment of the District Court was filed by the adverse respondents and the Dayton Board cross-appealed. On August 20, 1974, the United States Court of Appeals for the Sixth Circuit affirmed the finding of three cumulative constitutional violations. *Brinkman* v. *Gilligan,* 503 F.2d 684, 697 (6th Cir. 1974) (A. 56).

The Court of Appeals did not, however, pass upon the question of whether the rescission action constituted an independent constitutional violation. Rather, the appellate court stated that "[t]he question of whether a rescission of previous Board action is in and of itself a violation of the appellants' constitutional rights is inextricably bound up with the question of whether the Board was under a constitutional duty to take the action which it initially took." Continuing, the Court of Appeals held that "[i]f the Board was not under such a duty, then the rescission of the initial action in and of itself cannot be a constitutional violation. If the Board is under such a duty, then the rescission becomes part of the cumulative violation, and it is not necessary to ascertain whether the recission ipso facto is an independent violation of the Constitution." *Id.* at 697 (A. 55).

On the remedy issue raised in the appeal, the Sixth Circuit concluded that the remedy prescribed by the District Court was inadequate. Accordingly, the action was remanded to the Trial Court for formulation of another desegregation plan consistent with the remedial guidelines of *Keyes* and *Swann.* *Id.* at 704 (A. 68).

After the first appellate remand the District Court ordered the Board and any other interested party to submit desegregation plans. Under the plan submitted by the adverse respondents each and every school in the Dayton system would have become racially balanced; that is, the black-white student ratio in each school would approximate within a plus or minus fifteen percent the black-white ratio of the entire district (A. 77-78). The plan submitted by the Dayton Board contained the following key elements:

(1) The closing of the all black Roosevelt High School with the students who would have attended this school being given priority under open enrollment to attend any high school (A. 145);

(2) Creation of a downtown magnet high school and satellite magnets at the predominantly black schools of Dunbar and

Roth with enrollments in the specialized courses offered at these magnets open to students throughout the district (A. 145);

(3) Creation of magnet learning centers for foreign languages, business education and career motivation for sixth through eighth grade students (A. 147-149);

(4) Establishment of a new vocational high school where student enrollment would be racially balanced (A. 146);

(5) Expansion of the science learning centers to accommodate additional middle school students (A. 149);

(6) Establishment of a structured, alternative elementary school at the predominantly black Miami Chapel School where enrollment would reflect the approximate racial balance of the system for those students who attended this elective full time school (A. 146, *see* A. 92).

After a hearing on these plans, the District Court rejected the plan of the adverse respondents; found that racial balance in each and every school was not required under *Swann;* and concluded that the racial balance plan of the adverse respondents was violative of the Equal Educational Opportunities Act of 1974 (A. 79). In provisionally accepting the plan of the Dayton Board for the 1975-76 school year, the Trial Court held that the plan of the Board was desegregative in intent and integrative in effect (A. 80, 83).

In this order of March 10, 1975 the District Judge additionally held that (1) the State of Ohio has not since 1887 mandated a dual system (A. 75); (2) although the Dayton Board has engaged in activities that were segregative in effect and which impinged upon the constitutional rights of the plaintiffs, the Board did not at any time maintain a dual system of education (A. 75, 77); and (3) there were no district-wide segregative acts (A. 77).

The March 10, 1975 order accepting the Board plan was again appealed by the adverse respondents to the Sixth

Circuit Court of Appeals. A motion of the adverse respondents for summary reversal was deferred pending a stepped-up time for submission of briefs and oral arguments. While declining to grant summary reversal because of the time factor between the rendition of the opinion and the opening of school in the fall of 1975, the Court of Appeals remanded the action to the District Court with the direction that "the Court adopt a system-wide plan for the 1976-77 school year that will conform to the previous mandate of this Court and with the decisions of the Supreme Court in *Keyes* and *Swann.*" *Brinkman* v. *Gilligan*, 518 F.2d 853, 857 (6th Cir.) (A. 96), *cert. denied*, 423 U.S. 1000 (1975).

In this second appellate opinion rendered on June 24, 1975 the Court of Appeals held that the Board plan was inadequate since "the basic pattern of one-race schools would continue largely unabated" and "the vast majority of one-race schools will remain identifiable as such." *Id.* at 856 (A. 93). Additionally, the Court of Appeals held that the Equal Educational Opportunities Act of 1974 did not limit the scope of the remedy for the constitutional violations found to exist. *Id.* at 856 (A. 95).

After the second remand order the Trial Court appointed Dr. Charles Glatt as an expert witness for the purpose of preparing a desegregation plan. Due to the unfortunate death of Dr. Glatt the District Court on November 5, 1976 appointed Dr. John A. Finger, Jr. as a court consultant and ordered the Dayton Board and other interested parties to submit desegregation plans on or before December 1, 1975.

During this same time a petition for a writ of certiorari was filed with this Court. The adverse respondents objected to the entertainment of the writ on the grounds that the appellate order of June 24, 1975 was interlocutory and was a remand order requiring further substantive proceedings. See, *e.g., Brotherhood of Locomotive Firemen and Engineermen* v. *Bangor and Aroostook R.R.*, 389 U.S. 327 (1967); *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251, 257-258 (1916).

Thereafter the writ was denied. *Dayton Board of Education* v. *Brinkman*, 423 U.S. 1000 (1975).

On December 8, 1975 hearings were held upon the plan submitted by the adverse respondents and the plan transmitted to the Court by the defendant Board. After considering these plans the Trial Court on December 29, 1975 decreed that the Dayton Board could adopt any plan provided that as of September 1, 1976 each school in the Dayton system was desegregated. Desegregated was defined so as to require each school in the system (excepting grades eleven and twelve for the academic years of 1976 through 1978) to have a pupil population that reflected, within a plus or minus fifteen percent, the racial composition of the district as a whole (A. 103). Dr. Finger was appointed as a Master to supervise these student assignments and was directed to submit an assignment report (A. 104-105).

The Master filed his report on March 15, 1976, and a hearing was held on this report on the 22nd and 23rd of March. At the conclusion of the hearing the Trial Court adopted the Master's racial balance assignment plan for the elementary level and rejected the phase-in proposal of the defendant Dayton Board (A. 110-111). At the high school level the Court permitted the Board to choose between the Master's student selection plus random assignment or the Board's proposal for specific attendance districts with the proviso that the racial balance requirement be met (A. 111).

On May 14, 1976 the District Court granted a modification of the Master's report which did not affect the racial balance requirement. At the same time the Court rejected a request seeking permission to exclude most of next year's eighth graders from the racial assignment requirement (A. 117).

An appeal from the judgments of December 29, 1975 and March 25, 1976 was prosecuted by the Dayton Board. The request of the Board for a stay pending appeal was denied, but the entire appellate timetable was stepped-up. On July

26, 1976 the Sixth Circuit affirmed the judgment of the Trial Court which ordered a district-wide racial balance distribution of students in each school in the Dayton system. *Brinkman* v. *Gilligan*, 539 F.2d 1084 (6th Cir. 1976) (A. 118).

The Dayton Board's petition for a writ of certiorari, filed on October 18, 1976, was granted by this Court on January 17, 1977.

VI. SUMMARY OF ARGUMENT

This case raises questions of the definition and limitations of a federal court's equitable powers in fashioning school desegregation remedies. The Dayton Board contends that fundamental legal and constitutional principles have been ignored and distorted by the decisions of the District Court and the Sixth Circuit.

First, the scope of the remedy in a school desegregation case must be determined by the nature of the violation. The lower courts, while finding only limited constitutional violations which did not affect a substantial portion of the Dayton district, have imposed a sweeping decree affecting every school and student in the system. In doing so, they have abandoned a fundamental remedial principle and replaced it with a "mine field" approach under which a school board by committing an isolated segregative act or series of acts triggers off a system-wide remedy.

Second, the fashioning of a desegregation remedy should be guided by the fixed purpose of eliminating state-imposed exclusion of individuals from schools on account of race. By adopting the false assumption that schools cannot be desegregated unless the racial composition of the student body in each school substantially reflects the racial composition in the system as a whole, the lower courts have abandoned this purpose and replaced it with a purpose of securing system-wide racial balance. In doing so they have erroneously constructed a substantive "constitutional" right to a particular degree of racial balance. No such right exists.

Third, the ultimate test of a desegregation remedy is its pragmatic effectiveness in achieving desegregation. The lower courts abandoned this test and replaced it with an artificial mathematical formula test. In doing so they ignored evidence that the result of a system-wide racial balance plan in Dayton would be the conversion of a constitutional promise of equal educational opportunity into the ashes of an impoverished school system serving a low economic, predominantly black student population.

Finally, the lower courts ignored the threshold principle that judicial intervention is not permissible in the absence of a showing of injury to the complainants or some class which they legitimately represent. The jurisdiction which the lower courts exercised in fashioning the inappropriate decrees that have been imposed was never invoked by a party who had standing to bring this action.

VII. ARGUMENT

A. IN A SCHOOL DESEGREGATION CASE THE IMPOSITION OF A DISTRICT-WIDE RACIAL BALANCE REMEDY EXCEEDS THE REMEDIAL AND EQUITABLE POWERS OF A FEDERAL COURT AND VIOLATES 28 U.S.C. § 1712 WHERE, ALTHOUGH ISOLATED SEGREGATIVE PRACTICES HAVE BEEN FOUND TO EXIST, IT HAS BEEN AFFIRMATIVELY DETERMINED THAT THE BOARD OF EDUCATION HAS AT NO TIME MAINTAINED A DUAL SYSTEM.

This case poses basic questions of the limitations of the power of federal courts in fashioning remedies in desegregation cases. The principles from which those questions must be resolved have been enunciated by this Court on repeated occasions. They have unfortunately been ignored with the mildest of lip service in numerous lower court decisions.

In fashioning desegregation decrees, equitable principles control. *Brown* v. *Board of Education*, 349 U.S. 294, 300 (1955).

> "[T]he task is to correct by a balancing of the individual and collective interests, 'the condition that offends the Constitution'. A federal remedial power may be exercised 'only on the basis of a constitutional violation' and, '[a]s with any equity case, the nature of the violation determines the scope of the remedy.'"

Milliken v. *Bradley*, 418 U.S. 717, 738 (1974), quoting *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). Before any affirmative duty arises to dismantle and to eliminate the identifiability of one-race schools, there must be a finding of a dual system mandated by state statute or a dual system predicated upon evidence establishing state-imposed segregation in a substantial portion of the school district. *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189, 200, 203, 208-209 (1973).

The Sixth Circuit has replaced these standards with a "mine field" theory of fashioning remedies in desegregation cases. Rather than shaping the scope of the remedy to fit the nature of the violation, it has been led by an erroneous definition of desegregation to the false position that the only effective remedy for a system tainted by an act of segregation is an overall remedy. Whenever a school board permits an isolated segregative act or series of acts, it triggers off a system-wide remedy of eliminating racial identifiability by balancing the races in each school in the system.

The relationship between the District Court and the Sixth Circuit in the course of this litigation dramatically reflects the opposition between the "nature of the violation" and the "mine field" theories of fashioning desegregation remedies. The District Court, after a three week trial, found in favor of the School Board on most of the contentions presented by the plaintiffs (A. 1-14). It found against the School Board in three specific and interrelated areas (A. 12) and set forth a

series of minimum requirements to eradicate the effects of the unconstitutional actions that were found to have occurred (A. 13). A plan incorporating those requirements and offering additional integrative proposals was adopted (A. 131-144).

The Sixth Circuit affirmed the factual findings, but looked at the remedy and in essence said "more". *Brinkman* v. *Gilligan*, 503 F.2d 684, 704-05 (6th Cir. 1974) (A. 69). The District Court broadened the remedy, but the Sixth Circuit – while again affirming the factual findings of the lower court – again said "more" with respect to the remedy. *Brinkman* v. *Gilligan*, 518 F.2d 853, 855 (6th Cir.) (A. 93), *cert. denied*, 423 U.S. 1000 (1975). After two reversals the District Court in frustration acknowledged the Sixth Circuit's view that the limited acts of the Dayton School Board had triggered a system-wide mine field (A. 100). Accordingly, it adopted a plus or minus fifteen percent racial balance plan (A. 103) which in turn was approved by the Sixth Circuit. *Brinkman* v. *Gilligan*, 539 F.2d 1084 (6th Cir. 1976) (A. 118).

To gauge and correct the error committed in this case it is necessary to analyze the factual findings that have been made and place them in the context of the applicable law.

1. The Limited Nature Of The Violation In This Case Was Carefully And Narrowly Defined By The Finder Of The Facts.

The arch on which the ruling against the Dayton School Board rests is composed of three findings.

> "The District Court found three constitutional violations in the Dayton school system, namely, (A) racially imbalanced schools, (B) optional attendance zones, and (C) the Dayton Board's rescission of three resolutions. These were held by the District Court to be 'cumulatively in violation of the Equal Protection Clause' . . . .
>
> "We hold that the findings of fact on which the District Court based its conclusion of a cumulative violation are not clearly erroneous but, to the contrary, are amply supported by the evidence."

Brinkman v. *Gilligan*, 503 F.2d 684, 693 (6th Cir. 1974) (A. 48), (*see* A. 12, 77). As will become apparent, the finding as to optional zones is the keystone to the arch since the other two findings could not independently support a ruling against the Dayton Board of Education.

Before an analysis is made of the adverse findings of fact, they should be placed in the context of the other findings made by the Trial Court. Although racial imbalance existed in the schools comprising the Dayton district, the student population of each school was consistent with the black-white distribution of population in the Dayton area (A. 5). All sixty-eight schools of the Dayton system – fifty-two elementary, five middle and eleven high schools, with the exception of the city-wide cooperative high school – were uniformly and impartially located in areas where students or potential students were concentrated (R. I. 1783, Vol. 18).[1] The Court found no evidence that school construction or site selection was segregative in nature or that the Board was ever guided in such matters by anything other than neutral criteria (A. 7). In compliance with section 3313.48 of the Ohio Revised Code attendance zones for each school, excepting the cooperative high school, were drawn so as to make access from home to school as convenient as possible for the greatest number of students (*see* R.I. 1560, Vol. 16). These zones were not irregular in shape (A. 5), were not gerrymandered (A. 6) and had remained essentially stable over the past twenty years (A. 278), notwithstanding changes in the student composition whereby

---

[1] References in this brief to the record consisting of the twenty volumes transcribed during the violation hearing held in November and December of 1972 will consist of the designation R. I., followed by the page and volume number; references to the record consisting of the remedial hearings held in February of 1975 will consist of the designation R. II. and the references to the record of the remedial hearing held in December, 1975 and March, 1976 will consist of the designation R. III.

many of the schools changed from predominantly white to predominantly black (*see* Def. AR, R. I. 1237, Vol. 12; R. I. 2011, Vol. 20). Where construction of new schools required boundary changes, the changes have been rational, reasonable and within the sound discretion of the Board (A. 5). White students have not been bused past black schools to white schools, and black students have not been bused past white schools to black schools (A. 5).

In 1969 assignment patterns were modified by enactment of a Freedom of Enrollment Policy which permitted student transfers for the purpose of improving racial balance (R. I. 1335, Vol. 13). This program was not operated in any manner so as to discriminate against any student and free transportation was provided starting in 1972 (*see* A. 9). There was no evidence of inequality of facilities in the Dayton school system or inequality in instruction or curriculum opportunities (A. 30).

Starting in the 1951-52 school year black teachers were gradually assigned to white or mixed schools, and by 1969 each school in the Dayton system had an integrated teaching staff (A. 4). In 1969 the Dayton School Board employed more black teachers than any of the other twenty largest school districts in the State of Ohio, and in the fall of 1971 the teaching staff in each school in the system became organized so that the staff in each school substantially reflected the ratio between the number of black and white teachers employed in the entire Dayton system (A. 4). The teaching staff as of the date of the Trial Court's initial order remained substantially integrated, and with respect to non-teaching and non-administrative personnel the Court found that blacks comprised thirty-eight percent of the total work force for the school years 1971-72 and 1972-73 (A. 4).

Against these positive findings in the areas of school construction, site selection, attendance zones, assignment patterns, facilities, faculty and non-teaching staff, the Court raised three negative findings that it characterized as a cumulative violation of the Constitution (A. 12). In doing so it was careful to circumscribe its negative findings by holding that

the Dayton School Board did not at any time "maintain a dual system of education" (A. 75, 77).

In its opinion following the first remand from the Sixth Circuit the District Court stated that:

> "The defendant School Board of the City of Dayton had engaged in activities which were segregative in effect and which did impinge upon the constitutional rights of students in such system. At no time, however, did defendant maintain a dual system of education. (A. 75).
>
> "We do not deal with a mandated dual school system we do not deal with actions taken on a school-by-school basis. We do deal with a system that has in the past permitted segregative practices to exist." (A. 77).

This holding of a non-dual system not only establishes that the Dayton district was not operating a mandated dual system as proscribed in *Brown I;* it also confirms that the cumulative constitutional violations did not constitute state-imposed segregation in a substantial or significant portion of the district as proscribed in *Keyes.*

In light of the positive findings and the holding of non-duality, an analysis of the negative findings is necessary for purposes of determining the scope of the remedy.

a. The adverse finding of racially imbalanced schools has no independent constitutional significance.

The Court's first adverse finding – a condition of racial imbalance in schools as a result of the geographic distribution of races in the school system – was admitted by the defendant at the outset of the case. Such a finding, however, is constitutionally innocuous in and of itself. *Lawlor* v. *Board of Education of City of Chicago,* 458 F.2d 660 (7th Cir. 1972), *cert. denied,* 413 U.S. 921 (1973); *Bradley* v. *School Board of City of Richmond,* 462 F.2d 1058, 1069 (4th Cir. 1972), *aff'd equally divided court,* 412 U.S. 92 (1973); *Spencer* v. *Kugler,* 326 F. Supp. 1235 (D. N.J. 1971), *aff'd,* 404 U.S. 1027

(1972); *Deal* v. *Cincinnati Board of Education*, 419 F.2d 1387 (6th Cir. 1969), *cert. denied*, 402 U.S. 962 (1971).

This Court has left no room for doubt as to the significance of a finding of racial imbalance in a school system.

> "That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. The essential element of de jure segregation is 'a current condition of segregation resulting from intentional state action . . . the differentiating factor being between de jure segregation and so-called de facto segregation . . . is *purpose* or *intent* to segregate.'"

Washington v. *Davis*, 426 U.S. 229, 48 L.Ed.2d 597, 608 (1976), quoting *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189, 205, 208 (1973). Proof of racially discriminatory intent or purpose — not mere proof of racial imbalance — is required to show a violation of the Equal Protection Clause. *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation*, — U.S. —, 50 L.Ed.2d 450, 464 (1977). While racially identifiable schools do not violate the Constitution, the predicate for the Sixth Circuit's affirmance of the racial balance plan was — ironically enough — the existence of identifiable one-race schools. *Brinkman* v. *Gilligan*, 518 F.2d 853, 855-56 (6th Cir. 1975) (A. 93), *cert. denied*, 423 U.S. 1000 (1975).

b. The adverse finding with respect to rescission of the resolutions of December 8, 1971 has no independent constitutional significance.

Like its first finding the Trial Court's third and last "cumulative" finding would not alone support a ruling against the Dayton Board. On December 8, 1971 a lame duck Board of Education, whose majority had lost the November, 1971 election, passed three resolutions. One of these resolutions required the elimination of all attendance zones with concomitant transportation of students on a large scale basis for the purpose of achieving a racial and economic balance of students within each school in the Dayton system. After several parliamentary maneuvers, the new Board majority on January 3, 1972 took action which in the opinion of the District Court constituted a rescission of the resolutions (A. 10-11).

While the rescission action was held by the District Court to have constituted an independent constitutional violation, the Sixth Circuit held simply that the rescission was part of the cumulative violation since rescission alone could not constitute a violation of the Constitution unless there was a constitutional duty to take the action that was rescinded. *Brinkman* v. *Gilligan*, 503 F.2d 684, 697 (6th Cir. 1974) (A. 55). If the Board was under no constitutional duty to adopt the December 8th resolutions, it had the same power to rescind them as it had to adopt them. The extent to which rescission of the resolutions could be considered the breach of a constitutional duty and therefore part of a cumulative violation is measured by whatever unfulfilled duty to remedy the effects of segregative acts the Constitution placed upon the Board as of December 8th.

The reasoning of the Sixth Circuit on this point was manifestly correct and in accord with prior decisions of this Court. *See, e.g., Hunter* v. *Erickson*, 393 U.S. 385 (1969); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *cf. San Antonio Independent School District* v. *Rodriquez*, 411 U.S. 1 (1973). Any other reading would invite the creation of substantive constitutional rights by the exercise of ingenuity in the pursuit of parliamentary games.

c. The adverse finding with respect to optional zones, whether considered separately or as part of a cumulative violation, did not involve a substantial portion of the students in the Dayton system.

It is apparent that the finding with respect to optional zones is the keystone of the cumulative violations which the Court found to exist. Without this finding neither of the other two findings – racial imbalance and rescission of resolutions – would have any constitutional significance. Here at the core of the case the nature of the violation must be defined.

Numerous optional attendance areas were created in the Dayton system in the 1950's and early 1960's (*see, e.g.*, R.I. 1905-1917, Vol. 19). The optional areas, which permitted a student residing in a designated zone to attend one of two schools, were scattered throughout the system (A. 280) and were located so as to be equidistant from the two schools that they served (A. 278). Standards of access, safety, school capacity, convenience and prior patterns of attendance were the criteria governing the establishment of optional zones (R.I. 1878-1879, 1889-1890, Vol. 18).

The plaintiffs' own chief expert would not argue with these criteria, would admit that such optional areas were widely used by most big city school systems during the time period in question and would concede that such areas are used for legitimate reasons (A. 279). Indeed, it is self-evident that no optional zone ever excluded anyone from attending any school in the Dayton system; such a zone simply provided a choice between two schools for students living within its boundaries (*see* A. 280).

The District Court specifically held that "the majority of the optional zones had no racial significance at the time of their creation" (A. 8). It went on to hold, however, that four specific optional zones "may have constituted exceptions to this general rule" and that two of those four zones – Roosevelt-Colonel White and Kiser-Colonel White – "have had the most demonstrable racial effects in the past" (A. 8). In assessing

the current effect of these few optional zones and in reasoning back from effect to cause, the Court was less specific.

As *Keyes* and *Washington* have confirmed, the essential elements of de jure segregation are (1) a current condition of segregation resulting from (2) intential State action. On the issue of intent the District Court noted the role played by considerations of convenience of parents in the creation of optional zones and found that "at times this last concept embraced desires motivated by racial considerations" (A. 8). There was no finding that such motivation was in fact at work on either the Board or the affected parent level in the four optional zones found to have had racial significance at the time of their creation. The Court simply supported its holding of segregative intent on the thread of generalized considerations of parental convenience.

On the issue of current condition the Court found no racial effects of the optional zones at the elementary school level – "none of the elementary school optional zones today have any significant potential effects in terms of increased racial separation" (A. 8). The only elementary school zone (Westwood-Jackson) listed as having had possible racial significance at the time of its creation in 1952 remained in effect up to and including the time of trial even though the two schools affected had been predominantly black for the latter part of that twenty year period (A. 17, *see* Def. Ex. AR, *supra*, at 18).

This leaves three high school optional zones (Fairview-Roth, Kiser-Colonel White and Roosevelt-Colonel White, A. 8) as the constitutionally offensive product of the Court's attenuated finding of segregative intent.

The first of these three zones is clearly *de minimus*. The Fairview-Roth optional area was created in 1965 at which time Roth was 53.5 percent black and Fairview was 0.9 percent black (A. 17). There is no evidence that the creation of this area was in fact motivated by any segregative purpose. The area was small (A. 280) and its creation had no significant racial consequences. In fact, from the time of creation

of the area until the 1972-73 school year only three students took advantage of the option, and this exercise of the option did not occur until six years after the area was created (A. 281).

The second high school zone – the Kiser-Colonel White optional area – was between predominantly white schools (A. 282) and had no racial significance at the time of its creation in 1962 (A. 17). At the start of the 1963-64 school year, the black composition of Kiser was 2.7 percent and that of Colonel White was 1.1 percent (A. 17). During the ensuing ten years, the black composition at Colonel White increased to 54.6 percent and that of Kiser to 9.8 percent (A. 17). At no time during this period did the Board attempt to respond to the changing composition of these schools by altering the optional zone (*cf.* R. I. 1302-1303, Vol. 13). Moreover, from 1967 through 1971 only 129 students took advantage of this option (A. 281).

The last and largest of the optional zones determined by the Court to constitute a racially significant result of Board action was the Roosevelt-Colonel White optional area. The greatest bulk of this area was created in 1951 (A. 17) and the remainder of the area which constituted a couple of city squares was added in 1959 (A. 282). The extent to which parental convenience masking racial considerations played a role in the creation of this area remains speculative. There was persuasive evidence that problems of industrial expansion, access and increased availability of public transportation led to the establishment of the area (R. I. 1890-1894, Vol. 18).

The initial effect of the area on racial separation is likewise dubious. In 1951 Roosevelt was 31.5 percent black and Colonel White had no black students (A. 17). From 1951 until 1957 the percentage of black students at Roosevelt had only increased from 31.5 percent to a minimum of 35 percent and a maximum of 40 percent (R. I. 796, Vol. 8). This optional area was not changed at any time since 1957 (A. 282), and its net effect as years passed and populations shifted could be characterized as integrative rather than segregative.

Had the optional area reflected a segregative intent on the part of the Board to permit some whites to depart from an increasingly black student body at Roosevelt, it would have been logical for the Board to have eliminated the option once blacks moved into the area. The optional zone, however, remained unaltered, and it ultimately served to enable more blacks to attend a mixed racial setting at Colonel White (A. 283).

This, then, is the nature of the violation found by the District Court. Against the background of racial imbalance generated by residential patterns in the community, the Dayton Board created four optional attendance areas that may have had "potential effects in terms of increased racial separation" (A. 8). While the establishment of such areas was largely guided by neutral criteria, the Board's consideration of convenience of parents may have caused it to yield to "desires motivated by racial considerations" (A. 8). Thus, purpose or intent to segregate was found to underlie the limited violations found to exist. Since the Board had a constitutional duty to remedy those violations, its rescission of resolutions which *inter alia* would have accomplished that result was to the extent of that duty a cumulative violation of the Constitution.

2. The Sweeping Remedy Imposed In This Case Should Be Restructured In Relationship To The Nature Of The Violation.

Despite the countless man-hours that have been spent in chasing the will-o'-the-wisp of a system-wide plan that would satisfy the mandates of the Sixth Circuit, it requires no exercise in abstruse metaphysics to fashion a remedy with a scope designed to cure the nature of the violations found to exist in this case. The first step would be to eliminate the offending optional zones. This has been done. The second and final step would be to eliminate any effect of increased racial

separation the zones may have produced at the three high schools in question.

In the latest commentary from this Court on the core principle that the nature of the violation determines the scope of the remedy, Mr. Justice Powell has suggested that the appropriate test of an equitable remedy is whether the evidence indicates that the extent of integration sought to be achieved by the remedy "would have existed had the school authorities fulfilled their constitutional obligations in the past." *Austin Independent School District* v. *United States*, – U.S. –, 45 U.S.L.W. 3413 (U.S. Dec. 6, 1976) (per curiam). This, we respectfully submit, is a rational test that is in accord with historic principles of equity.

Application of the *Austin* test to the present case suggests that simple elimination of the optional zones would have been an adequate remedy. Had the zones not been created, housing patterns in Dayton suggest that by 1972 Roosevelt High School would have been predominantly black, Kiser High School predominantly white and Colonel White a relatively balanced mixture of races. This is in fact what occurred, and it is extremely doubtful that the pattern was altered or affected in any meaningful way by the optional zones between those schools. After all, the optional zones remained substantially unchanged from the time of their adoption while populations shifted and the complexion of schools changed.

Even assuming that the existence of the optional zones had a segregative effect at the schools in question, the requirements of an appropriate remedy have been satisfied by actions that have now been taken with finality. Roosevelt High School has been closed (A. 145); a new vocational school with a student body reflecting the racial composition of the district as a whole has been created at Kiser (A. 146); Colonel White, which had a student population approximating that district-wide ratio, required no alteration. The other aspects of the various plans that have consumed the energies of the parties and the courts in this case since February 7, 1972 have unfortunately been no more than efforts to appease the Sixth Circuit's "mine field" theory of desegregation remedies.

The plaintiffs in this case have long since recognized that the only way to avoid the conclusion that the remedy is disproportionate to the wrong and therefore inequitable would be to rewrite the original findings of fact. On each of the three appeals that have been taken from the District Court they have begged the Sixth Circuit to reconsider the refusal of the District Court to include other allegedly unconstitutional acts as part of the cumulative violation, but on each occasion the Appellate Court has refused to do so. The factual findings, both favorable and unfavorable, are fixed in this case, and they were supported by ample evidence. The facts were written before this case was tried; it is not they but the remedy which must be rewritten.

3. The Remedy Imposed In This Case Erroneously Elevates The Achievement Of Racial Balance To The Status Of A Constitutional Right.

The Sixth Circuit's departure from the remedial principles established by this Court stems less, we submit, from a readiness to impute to school officials a segregative intent more pervasive than the evidence justified than from an idealistic commitment to a concept that there can be no desegregation without the achievement of some degree of racial balance in every school. The violation is only significant as an excuse for a judicial foray into a realm of what can only be called sociological science fiction. Instead of exercising the traditional equitable role of constructing specific remedies to rectify specific violations of a legal or constitutional duty, it has erroneously assumed the more grandiose role of attempting to construct whole school systems on a racially utopian scale. However well intentioned such an effect may be, it exceeds the bounds of judicial power and competence and produces results that are punitive rather than remedial.

At the core of the confusion lies a misconstruction of the term "desegregation". By equating that term with elimina-

tion of racially identifiable schools, the Sixth Circuit continues to follow the assumption that schools cannot be truly desegregated unless the racial composition of the student body in each school substantially reflects the racial composition of students in the system as a whole. This Court, in prior litigation arising from the Sixth Circuit, has expressly declared such an assumption to be erroneous. *Milliken* v. *Bradley,* 418 U.S. 717, 740-41 (1974).

As a result of its persistence in this fundamental definitional error the Sixth Circuit has in effect established a new constitutional right that can only be enforced on a system-wide basis. The implications extend far beyond the Dayton school system. The plaintiffs' chief expert acknowledged that by his definition of segregation in terms of racial imbalance – which is essentially the definition adopted by the Sixth Circuit – there is only one known school system in the entire United States which is not segregated (R. I. 1538, Vol. 16). So long as this kind of confusion remains uncorrected the Sixth Circuit and other courts will continue to ignore the nature of the violation while fashioning the scope of the remedy.

It is fascinating to observe the metamorphosis of the District Court's approach in this case under the pressure of successive reversals by the Sixth Circuit. In its initial opinion it carefully outlined its specific findings of fact and delineated the outline of a remedy appropriate to those findings (A. 12). In reviewing the plans submitted after the first remand it rejected the plaintiffs' plan which was designed to assign students among the Dayton schools in a black/white ratio approximating the district-wide ratio for such schools with a variation of fifteen percent, plus or minus, from the mean with the comment that, "[t]he obligation does not exist to create racial balance which is in essence the sole function of the plaintiffs' plan" (A. 79).

After the second remand, however, the District Court surrendered its efforts to follow the principles established by this Court and announced that the *sine qua non* of any plan

would be precisely the racial balance which it had previously characterized as a non-existent obligation:

> "Given the predicate that the limited segregatory activities found by this Court in its order of February 7, 1973, brings this matter within the ambit of *Swann* and *Keyes,* the remedy must be obvious. This Court now reaches the reluctant conclusion that there exists no feasible method of complying with the mandate of the United States Court of Appeals for the Sixth Circuit without the transportation of a substantial number of students in the Dayton school system. (A. 100).
>
> ". . . [t]his Court does therefore ORDER that as of September 1, 1976, each and every school in the Dayton school district will have a pupil population approaching the district percentage, but deviating no more than fifteen percent, plus or minus." (A. 103).

Two reversals were enough to supplant the precepts of the Trial Court with the Sixth Circuit's "mine field" theory of desegregation remedies.

In its reluctant acceptance of the Sixth Circuit's erroneous theory the District Court articulated a principle that has been implicit, although unstated, in the decisions of the Sixth Circuit:

> ". . . [i]t is a constitutional right enforceable in the federal courts that students, irrespective of race or residence, shall share equally all facilities of a school system, both the superior and the inferior.
>
> "The only feasible method of sharing requires a balancing in each school between black and white students in a ratio approximating the system-wide balance." (A. 102).

The Sixth Circuit attempted to write off this language as a judicial slip of the pen, but it is not enough to say that, "read literally the quoted language does appear to create a right which the federal courts have never recognized." *Brinkman* v.

Gilligan, 539 F.2d 1084, 1087 (6th Cir. 1976) (A. 122). Whether the Sixth Circuit has or has not recognized the "right", it has certainly attempted to create it by ignoring the equitable principles involved in the fashioning of desegregation remedies and requiring the elimination of racially identifiable schools whenever any constitutional violation, however limited in effect, has been established.

The constitutional right involved in this case is simply the right not to be excluded from any school "directly or indirectly on account of race". *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 23 (1971). Ever since *Brown I* the objective of federal courts in school desegregation cases has been the elimination of a dual system; that is, racial segregation arising out of mandatory state statutes or constitutions and racial segregation arising out of intentional state actions affecting a substantial portion of a school district. *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189, 203 (1973). Since the Dayton district has not operated a dual system, there exists no basis for the judicial decree ordering the assignment of students on a racial basis. *See Swann* v. *Charlotte-Mecklenburg Board of Education, supra* at 28.

In transforming the constitutional right from a right not to be excluded from any facility into an affirmative right to be included in every facility, the Sixth Circuit implicitly and the District Court explicitly have strayed from these fundamental principles. With this Court rests the burden of returning the law in this area to its proper path and restoring the constitutional right involved to its proper form.

4. The Remedy Imposed In This Case Violates The Equal Educational Opportunities Act of 1974.

While it is unnecessary to go beyond the basic principles established by the Constitution and prior decisions of this Court to resolve the questions presented by this case, it is important to note that the "mine field" approach used by the lower courts to impose a system-wide racial balance on the

Dayton schools is also in direct conflict with the statutes that have been enacted in this area. Under the Equal Educational Opportunities Act of 1974 a court can impose only those remedies which are essential to correct particular denials of equal protection of the laws. 20 U.S.C. § 1712. The Act specifically prohibits a court from ordering transportation for the purposes of racial balance. 20 U.S.C. §§ 1751, 1754.

The Sixth Circuit accepted the respondents' argument that the language of section 1702(b) of the Act – to the effect that the Act was not intended to modify or diminish the authority of the courts to enforce fully the Fifth and Fourteenth Amendments – was an exception that swallowed up all the rules that the Act purported to establish. *Brinkman* v. *Gilligan*, 518 F. 2d 853, 856 (6th Cir.) (A. 95), *cert. denied*, 423 U.S. 1000 (1975). The Act, like the nature of the Board's violations, was perceived as immaterial to the task of eliminating racially identifiable schools.

Yet the intent of Congress in enacting Chapter 39 of the 1974 Act was clearly to focus attention on the core principle that the nature of the violation determines the scope of the remedy and to establish an obligatory order of remedies or combinations thereof which would be uniformly followed by the courts. When – and only when – these remedies are insufficient to correct a constitutional violation, the language of section 1702(b) comes into play. This construction is not only logically sound; it is also constitutionally sound – logical in the sense that a legislative provision is given a meaning that does not completely vitiate the remaining provisions in the enactment and constitutional in the sense that such a construction does not raise any constitutional issue.

The Act cannot be cavalierly disregarded as waste paper. It does serve to provide the judiciary with material assistance in answering remedial questions in state-imposed segregation cases. *See Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 17-18 (1971). Except where – but for the exception contained in section 1702(b) – it would conflict with constitutional requirements it is the law of the land.

It is apparent that the sweeping remedy imposed in this case was not constitutionally mandated. As a racial balance plan requiring transportation for purposes other than the elimination of constitutional violations, it is contrary to and violative of the congressional prohibitions contained in the Equal Educational Opportunities Act of 1974.

B. IN A SCHOOL DESEGREGATION CASE THE IMPOSITION OF A DECREE WHICH REQUIRES A FIXED RACIAL BALANCE FOR EACH AND EVERY SCHOOL IN THE SYSTEM IS INVALID.

While the Sixth Circuit attempted to soft-pedal the District Court's plus or minus fifteen percent mathematical formula as a "flexible starting point," such is simply not the case. The same formula was rejected in Michigan because of its adherence to fixed racial ratios. *Bradley* v. *Milliken*, 411 F. Supp. 943 (E.D.Mich. 1975), *modified*, 540 F.2d 229 (6th Cir. 1976). The District Court's exclusion of junior and senior classes from the plan is applicable only for the current classes and will have no effect or flexibility in future school years. The permitted deviations from the proposal of the Master likewise do not demonstrate flexibility since any permissible modification cannot deviate from the plus or minus fifteen percent requirement (A. 112, 115).

The racial balance formula in this case was in fact clamped onto the school district with adamantine bonds. That conclusion is demonstrated not only in the actual achievement of the objective but by the following actions, statements and rulings of the District Court.

(a) The Master's rejection of the Court's guidelines for maximum time and distance on transportation of students was approved (R. III. 313, *see* A. 162).

(b) Any deviations from the racial percentage on a school-by-school basis for geographic reasons was barred.

(The projected elementary assignments fall within plus or minus seven percent of the black-white ratio of the entire district and, excepting present juniors and seniors, the high school assignments fall within the required racial percentage.)

(c) The plan transmitted by the Board was considered solely in the context of racially balancing the district as a whole (A. 101).

(d) A "constitutional right" of students to share equally all facilities of a school system, enforceable by a balancing of students in each school, was established and granted (A. 102).

(e) A desegregated school was defined as one which has a black-white mix that reflects, within plus or minus fifteen percent, the district ratio (A. 103, 109).

(f) It was unequivocally ordered that as of September 1, 1976 each school in the Dayton system must have a pupil population that deviates no more than plus or minus fifteen percent from the racial ratio of the district (A. 103).

(g) The Master's elementary pairing plan which assigns students on the basis of the racial balance requirement was adopted (A. 110), and the Board's suggestion of a phase-in for eight schools was rejected (A. 111, R. III 378, 439-41).

(h) The Master's rejection of the assignment guidelines contained in the court order of December 29, 1975 was accepted.

(i) Only schools which are properly racially balanced were held acceptable for purposes of a desegregation remedy (A. 103, 105-106).

(j) The plus or minus racial balance requirement set forth in the December 29, 1975 order was reaffirmed as an essential component of any plan in the order of March 23, 1976 (A. 111).

If racial balance is the "starting point" of the Court's plan, it is also the "ending point".

The fundamental defects in the plan imposed in this case render its future difficult to conceive or chart. The articulation of the plan in terms of a fixed racial formula suggests that the ratio imposed by the Court is a permanent ratio so that adjustments of student assignments would be required each year as long as the system exists to maintain the ratio in each school. Before the Dayton plan reached the Sixth Circuit, however, this Court expressly declared that a requirement of such annual adjustments is beyond the authority of a court of equity. Once a court has corrected perceived constitutional violations on the part of a defendant school board, its role is concluded even though subsequent changes in the racial mix in the schools might be caused by factors for which the defendant could not be considered responsible, *Pasadena City Board of Education* v. *Spangler*, — U.S. —, 49 L.Ed.2d 599, 608 (1976).

The Sixth Circuit dodged the implications of the *Pasadena* decision by stating that the District Court's plan "directs no changes after the 1976-77 school year." *Brinkman* v. *Gilligan*, 539 F.2d 1084, 1087 (6th Cir. 1976) (A. 123). Yet the problem of perpetuities remains inherent in any system-wide racial balance remedy, and another school year is fast approaching. If the base line of the plan is a plus or minus fifteen percent racial balance in each school, how can the base line be maintained without annual adjustments of student assignments? It requires no crystal ball to predict that population shifts will continue to occur as they have occurred in the past, and it can be anticipated that with the passage of time both schools in at least some of the pairings will become predominantly black or predominantly white.

Should the Dayton Board annually adjust the whole network of pairings to maintain the racial balance ratios? *Pasadena* says, "No." Should it continue to drain its financial resources in order to bus black children from one predominantly black school to another or white children from one predominantly

black school to another? Common sense says, "No." Should it dismantle pairings as their significance in terms of racial balance becomes frustrated by population shifts? If so, the plan will be perceived as a failure.

The posting of these unanswerable questions is demonstration of the confusion that results when courts leave their traditional role of shaping particular remedies to particular wrongs and attempt to reshape society itself by judicial decree. In defining "desegregated" as synonymous with "racially balanced" and thereby requiring a particular degree of racial mixing as an essential component of desegregation, the District Court and the Sixth Circuit have mandated a fixed racial balance formula not as a simple starting point, but as an inflexible test for determining school desegregation. This approach is contrary to *Swann* and is not required by the United States Constitution. *Carr* v. *Montgomery County Board of Education*, 377 F.Supp. 1123, 1133 (M.D. Ala. 1974), *aff'd*, 511 F.2d 1374 (5th Cir.), *cert. denied*, 423 U.S. 986 (1975).

C. THE CONSTITUTION CANNOT BE DEEMED TO MANDATE A DESEGREGATION REMEDY THAT WILL RESULT IN RESEGREGATION OF STUDENTS SERVED BY THE SCHOOL SYSTEM.

The first test of the propriety of a desegregation remedy lies in the relationship it bears to the nature of the constitutional violations found to exist. The second test is whether it is guided by a purpose to desegregate rather than misguided by some constitutionally irrelevant purpose such as securing of racial balance. The third and final test is whether the remedy can be perceived as satisfying a pragmatic standard of effectiveness. The plan dictated and approved by the Sixth Circuit in this case fails the third test as well as the first and second tests.

The holdings in *Swann* require a "balancing of the individual and collective interests" and the taking of necessary steps to convert the school system to a "unitary system". *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-16 (1971). The promise that a plan will work must be "realistically" made. *Green* v. *County School Board*, 391 U.S. 430 (1968). The judicial effort should be an effort to achieve the greatest degree of actual desegregation "taking into account the practicalities of the situation." *Davis* v. *Board of Commissioners of Mobile County*, 402 U.S. 33, 37 (1971). Thus the final test of a plan is not whether it satisfies some abstract philosophical model, but whether all of the factors relevant to its actual success or failure have been pragmatically weighed and balanced. Is the plan reasonably calculated to satisfy the end desired?

The evidence presented at the hearings establishes that as a result of the demographic situation existing in the Dayton district any effort to achieve racial balance in each school in the system requires pairing and clustering of schools (A. 298-299) with concomitant busing of approximately fifteen thousand students. In his search for a racial balance remedy the District Judge accordingly adopted these devices despite unequivocal testimony from the respondents' own expert witness that they have not worked in the past and eventually result in a poor city with a poor school system (A. 291-294). Injunctive relief in such cases cannot extend to parents of school children, and for a variety of reasons a forced busing plan can be expected to drive whites and upper middle class blacks out of the system, leaving behind a low economic, predominantly black student population.

The recent history of other school districts undergoing desegregation accomplished by massive transportation plans confirms the gloomy prediction of the respondents' expert in this case. *See, e.g., Calhoun* v. *Cook*, 522 F.2d 717 (5th Cir. 1975). The issue presented is not a rhetorical issue of pro and con arguments regarding "forced busing", nor is it a sociological issue of refusal of the majority to recognize rights of the

minority. The issue, simply stated, is "Will the desegregation plan work?" If the remedy causes such a burden on the educational process that any students who can afford to do so will leave the system, the remedy is obviously a failure. The record establishes that during the five years this case has been in the courts 11,000 white and 900 black students have left the Dayton system (A. 301).

Certainly a remedy which defeats the goal of providing an equal educational opportunity for minority students and which will lead to resegregation of the city's schools is not constitutionally mandated. Indeed, an ironic and sad situation is presented when in the name of the Constitution, the rights and the opportunities which the Constitution was designed to protect are destroyed. The action of a federal court in imposing a plan that would inevitably lead to resegregation of the school system is no less a segregative practice than those unconstitutional practices which initially required federal intervention.

D. A COURT IS WITHOUT POWER TO IMPOSE A DECREE IN A SCHOOL DESEGREGATION CASE WHERE THE COMPLAINANTS HAVE FAILED TO ESTABLISH THAT ANY INJURY TO THEM HAS OCCURRED OR THAT THE ACTION IS MAINTAINABLE AS A CLASS ACTION.

The complaint in this case alleged that the individual adverse respondents were children or parents of children attending schools in the Dayton system and that the parent adverse respondents were bringing the action on their own behalf, on behalf of their minor children and on behalf of other children similarly situated. The N.A.A.C.P. joined in the action on behalf of its members who were allegedly members of the class. The allegations of capacity and class representation were denied in the answer filed by the Dayton Board.

The adverse respondents were again alerted by the pretrial order to the fact that questions of standing and capacity were

challenged. At the close of the respondents' case, the Dayton Board again raised the issue of whether they were members of the class they purportedly represented and whether this action was properly maintainable as a class action. (A. 124). The respondents made no response to the Board's motion and made no request to present evidence on these fundamental issues. The District Court completely ignored the issues.

On appeal the Dayton Board renewed its contention that the Court could not proceed to a disposition of the respondents' claims in the face of a total absence of any evidence to support a finding that the action was properly maintainable as a class action. The only indication that the Sixth Circuit reached this issue is its statement that "all contentions of the parties contrary to the conclusions reached in this opinion have been carefully considered and are found to be without merit." *Brinkman* v. *Gilligan*, 503 F.2d 684, 704 (6th Cir. 1974) (A. 69).

No explanation of just why this contention of the Dayton Board is without merit has yet been suggested by any court in five years of litigation. While desegregation cases raise significant social issues, the significance of the issues should not change basic procedural concepts and burden the federal courts with the responsibility of rendering far-reaching decisions at the request of curious bystanders.

1. The Record Is Void Of Any Evidence That Any Of The Adverse Respondents Sustained Any Injury Or Was Deprived Of Any Constitutional Right.

In the absence of proof that they were injured or deprived of some constitutional right the adverse respondents cannot prevail in this equity action. *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation*, — U.S. —, 50 L.Ed.2d 450, 462 (1977); *O'Shea* v. *Littleton*, 414 U.S. 488, 493-94 (1974); *McCabe* v. *A.T. & S.F. Railway Co.*, 235 U.S. 151, 162 (1914). Although the District Court

predicated jurisdiction under the Equal Protection Clause of the Fourteenth Amendment and under 42 U.S.C., sections 1981 and 1983 and 28 U.S.C., section 1343, jurisdiction does not exist in the abstract. Courts deal with particular rights of particular people, and the adverse respondents cannot prevail on the merits in the absence of proof of a violation of their rights under these provisions. *Cf. Bell* v. *Hood*, 327 U.S. 678 (1946). Comb the record for such proof. No scintilla exists.

A school desegregation case is no different from any other case in this respect. It was encumbent upon the adverse respondents to establish that one of them, or at least some member of the N.A.A.C.P., was excluded from a school in the Dayton system on account of race. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 23 (1971). None of the adverse respondents ever testified at the trial of this action, and none of the evidentiary exhibits established that any one of them was ever excluded from attending any school in the Dayton system. In addition to their failure to establish the minimal requirement of injury or deprivation of a constitutional right, the adverse respondents failed to establish that any one of them was a school child or a parent of a school child or that any of them ever attended or sought to attend school in the Dayton system.

If the District Court had jurisdiction to proceed to a determination of this case, the same anonymous collection of respondents have standing to file a similar law suit against every school board in the United States.

2. The Record Is Void Of Any Evidence That Any Of The Adverse Respondents Was A Member Of The Class They Purportedly Represented And There Was No Determination That This Action Was Maintainable As A Class Action.

The propriety of this action as a class action under Rule 23 of the Federal Rules of Civil Procedure is dependent

on proof from the individual adverse respondents that they are members of the class they purportedly represent. *Bailey* v. *Patterson*, 369 U.S. 31 (1962). It is further dependent upon certification by the District Court that the suit is maintainable as a class action. *Pasadena City Board of Education* v. *Spangler*, – U.S. –, 49 L.Ed.2d 599, 605 (1976). Neither of these requirements was met.

Were any of the adverse respondents members of the class that was allegedly, directly or indirectly, excluded from some school or schools in the Dayton system? Did any of them or any of their children ever attend any of the high schools found to be racially affected by optional zones? Did any of them or any of their children ever attend any Dayton school? Do any of them even live within the geographic boundaries of the Dayton school system? Are there any members of the N.A.A.C.P. who are also members of the class it purports to represent in this case? The answers to these questions will emerge from the lips of the inscrutable sphinx as readily as they will be found in the silent record of this case. The lack of such proof bars the maintenance of this law suit as a class action. *Davis* v. *Schultz*, 453 F.2d 497 (3d Cir. 1971); *Kauffman* v. *Dreyfus Fund, Inc.*, 434 F.2d 727 (3rd Cir. 1970), *cert. denied*, 401 U.S. 974 (1971).

Not only was there a failure to establish that any of the adverse respondents was a member of the class they purportedly represented, there was a failure on the part of the District Court to determine that this action was or was not maintainable as a class action. That failure, in and of itself, defeats the adverse respondents' desire to pursue this litigation as a class action.

VIII. CONCLUSION

The history of this case reveals a District Judge drawn by the magnetism of a significant social issue to disregard essential procedural requirements in order to address the substantive questions presented. In the first phase of the litigation he did an able job of finding the facts and attempting to apply the pertinent case law to those facts. Under pressure from successive reversals by the Sixth Circuit and with an evident sense of frustration, however, he ultimately imposed a sweeping remedy that bore no relationship whatsoever to what he referred to as "the limited segregatory activities found by this Court." (A. 100).

In doing so he violated the fundamental principle of fashioning appropriate remedies in desegregation cases. To borrow Mr. Justice Powell's succinct phrase, "A remedy simply is not equitable if it is disproportionate to the wrong." *Austin Independent School District* v. *United States*, – U.S. –, 45 U.S.L.W. 3413 (U.S. Dec. 6, 1976) (per curiam). He compounded the error by succumbing to the definitional confusion that has marred the efforts of the Sixth Circuit in desegregation cases. Once "desegregation" is defined in terms of elimination of racially identifiable schools instead of elimination of exclusions from schools on the basis of race, the path of error is easily traveled to the conclusion that the constitutional right to be free from state-imposed segregation is a constitutional right to share equally in all state facilities. The "obvious" way to enforce this right to share is to recast every school system in the United States in a judicial mold of racial balance.

Thus we arrive at a plan that bears no relationship either to perceived constitutional violations or to anything that would have been produced by the natural, unregulated actions of human beings. It fails the equitable tests of propriety and purpose. It also fails the test of pragmatic effectiveness. If, as the evidence suggests, the inexorable ultimate effect of the plan will be resegregation as a result of shifting population

groups, the goal of equal educational opportunities which the Constitution should serve has been subverted. The plan imposed in this case is not a product of constitutional mandate; it is a product of judicial confusion.

What relief should issue from this Court? Should the action simply be remanded with instructions that the lower courts impose a realistic plan that remedies only the limited constitutional violations that have been found to exist? We respectfully submit that those violations have been determined and confirmed through successive appeals. They have been extirpated root and branch from the Dayton system.

No optional zones exist; Roosevelt High School has been closed; a systemwide vocational school with a racially balanced student composition has been created at Kiser; no trace of the practices that were held to offend the Constitution can be found in the school system. Even had there been a basis established in the evidence for the District Court's assumption of jurisdiction in the first instance, there is no basis for the continuance of that jurisdiction at this stage. The case against the Dayton Board of Education should be dismissed with instructions that the Board should consider itself free to retain or reject those features of the plans imposed upon it that were not related to the limited violations found to have existed.

Respectfully submitted,

DAVID C. GREER
LEO F. KREBS
BIESER, GREER & LANDIS
of Counsel

8 North Main Street
Dayton, Ohio 45402

Counsel for Petitioners.